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# Giving Deference to Inaction: How *Geddes v. United Staffing Alliance Employee Medical Plan* Compromised an Employee's Right to Meaningful Review Under ERISA

Erin Nave\*

## INTRODUCTION

The Employee Retirement Income Security Act of 1974<sup>1</sup> (“ERISA”) regulates private sector employee welfare benefits and gives individual citizens the power to enforce these plans through a private right-of-action in the federal courts.<sup>2</sup> ERISA was designed to protect employees’ rights to the benefits promised them in exchange for their employment,<sup>3</sup> and accordingly gives citizens direct access to the U.S. District Court.

Congress did not specify the standard of review to be used by the district courts in reviewing these contested benefits determinations under ERISA.<sup>4</sup> Instead, the Supreme Court determined that cases of

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1. 29 U.S.C. §§ 1001–1461 (2000).

2. Ann K. Wooster, Annotation, *Judicial Review of Denial of Disability Benefits Under Employee Benefit Plan Governed by Employee Retirement Income Security Act*, 12 A.L.R. FED 2d 1, 1 (2006); 29 U.S.C. § 1132(a) (2000).

3. 29 U.S.C. § 1001 (2000).

4. “Although it is a ‘comprehensive and reticulated statute,’ ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108–09 (1989) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)).

At least one scholar has suggested that judicial construction of ERISA to infer a deferential standard of review is contrary to the protective intent of the statute. Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727, 728 (2004); see also Kevin Walker Beatty, *A Decade of Confusion: The Standard of Review for ERISA Benefit Denial Claims as Established By Firestone*, 51 ALA. L. REV. 733, 735–36 (2000); see *infra* Part III for further discussion of this criticism.

benefits denial are to be reviewed under the de novo<sup>5</sup> standard, unless the terms of the employee benefits plan<sup>6</sup> give certain discretion to the plan administrator,<sup>7</sup> which warrants higher deference from the courts.<sup>8</sup> Thus, in those cases where the employee benefits plan gives the plan administrator discretion to make decisions concerning both eligibility and benefits awarded to the plan beneficiary,<sup>9</sup> courts give deference to the plan administrator as fiduciary<sup>10</sup> and apply the “arbitrary and capricious” standard of review.<sup>11</sup> The arbitrary and capricious standard is the least demanding form of judicial review of any sort of administrative action.<sup>12</sup> This distinction is critical because

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5. The de novo standard of review allows courts to examine all of the evidence and contentions of the plaintiffs without deference to either party. Donald Bogan, *ERISA: Rethinking Firestone in Light of Great-West—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefits Claims*, 37 J. MARSHALL L. REV. 629, 630–31 (2004).

6. Under ERISA, an “employee benefit plan” or “plan” refers to either an employee welfare benefit plan, an employee pension benefit plan, or a plan that encompasses both. 29 U.S.C. § 1002(3) (2000). For purposes of this Note, an employee benefit plan refers to an employee welfare plan, defined as:

any plan, fund, or program . . . maintained by an employer or by an employee organization . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . .

29 U.S.C. § 1002(1).

7. ERISA defines “administrator” as “the person specifically so designated by the terms of the instrument under which the plan is operated;” or if left undesignated, the plan sponsor; or if the plan sponsor cannot be identified, another person that the Secretary of Labor chooses. 29 U.S.C. § 1002(16)(A).

8. Wooster, *supra* note 2, at 1; *Firestone*, 489 U.S. at 115; see discussion *infra* Part I.A.

9. ERISA defines “beneficiary” as “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” 29 U.S.C. § 1002(8).

10. ERISA defines “fiduciary” (as is relevant to an employee welfare plan) as someone who “exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A).

11. *Firestone*, 489 U.S. at 115. For further discussion of the arbitrary and capricious standard, see *infra* Part I.A.

12. *Williams v. Int’l Paper Co.*, 227 F.3d 706, 712 (6th Cir. 2000). “[T]he Court must decide whether the plan administrator’s decision was ‘rational in light of the plan’s provisions.’ Stated differently, ‘when it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.’” *Id.* (quoting *Daniel v.*

the standard of review employed frequently decides the outcome of benefits disputes.<sup>13</sup>

However, the circuit courts have not been unanimous in their decisions to extend application of the arbitrary and capricious standard in circumstances when the plan administrator retains all discretion in the plan instrument but parcels out some of that decision-making function to a third party.<sup>14</sup> In *Geddes v. United Staffing Alliance Employee Medical Plan*, parents of a minor child brought a lawsuit against their employer and third-party independent claims manager for wrongful denial of benefits under their health care plan.<sup>15</sup> In this case, the employer, as plan administrator, parceled out nearly all of its duties to a third party not named as fiduciary in the plan.<sup>16</sup> The Tenth Circuit panel reversed the decision of the trial court and determined that even though certain discretionary duties were delegated to a non-fiduciary third party, the courts should still apply the arbitrary and capricious standard of review.<sup>17</sup> This holding was an explicit departure from the decision of the Eleventh Circuit to apply the de novo standard in cases where fiduciary duties are delegated to non-fiduciaries.<sup>18</sup>

This Note proposes that the arbitrary and capricious standard of review should be eliminated in favor of a de novo standard of review in all benefits denial cases. Alternatively, the arbitrary and capricious standard of review should be strictly limited to cases where the benefits provider can plead with particularity enough facts to overcome a presumption in favor of the employee.<sup>19</sup>

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Eaton Corp., 839 F.2d 263, 267 (6th Cir. 1988); *Davis v. Ky. Fin. Cos. Ret. Plan*, 887 F.2d 689, 693 (6th Cir. 1989)).

13. Bogan, *supra* note 5, at 630.

14. *Current Circuit Splits*, 3 SETON HALL CIR. REV. 507 (2007).

15. 469 F.3d 919, 922–23 (10th Cir. 2006).

16. *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 922 (10th Cir. 2006).

17. *Id.* at 932.

18. *Current Circuit Splits*, *supra* note 14, at 518–19. The decision in *Geddes* departs from the persuasive authority of the Eleventh Circuit in *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (11th Cir. 1989), in which the panel held that delegating discretionary authority to a non-fiduciary causes the plan administrator to forfeit fiduciary status and triggers de novo review. *Geddes*, 469 F.3d at 927.

19. See discussion *infra* Part III.

Part I of this Note provides a brief history of the ERISA statute and explains the origins of the arbitrary and capricious standard. Part II discusses the Tenth Circuit's decision in *Geddes*. Part III analyzes the logic of the court in reaching its decision in *Geddes*, concluding that the Supreme Court incorrectly denied certiorari and should have heard and overturned the Tenth Circuit's decision. Finally, Part IV proposes possible Congressional reform to standards of review in ERISA benefits denial cases.

## I. HISTORY

### *A. ERISA and Determining a Standard of Review*

ERISA was enacted in 1974 due to significant public concern that private pension plan funds were being mismanaged and abused by employers.<sup>20</sup> In particular, Congress acknowledged that the lack of a statutory requirement for vesting provisions in pension plans caused employees who had worked for many years for a single employer to lose expected retirement benefits because their benefit plans did not specify any particular time period or mechanism for those funds to become non-forfeitable.<sup>21</sup> In response, Congress drafted ERISA,

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20. History of EBSA and ERISA, U.S. Dept. of Labor Employee Benefits Security Administration Webpage, <http://www.dol.gov/ebsa/aboutebsa/history.html> (last visited Mar. 13, 2009).

21. 29 U.S.C. § 1001(a) (2000) states:

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . . it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare . . . that . . . safeguards be provided with respect to the establishment, operation, and administration of such plans . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries. . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

*Id.*

which established minimum standards of conduct for private pension plans<sup>22</sup> and provided a private right-of-action for citizens to redress their grievances in the federal courts.<sup>23</sup> Since 1974, ERISA has been further amended by Congress to cover a wide scope of private employee benefits, including retirement and health care plans for both employees and their families.<sup>24</sup>

Although ERISA provides for a private right-of-action for individual citizens in the federal courts, it does not specify the standard of review courts should use to adjudicate these cases. As a result, the Supreme Court clarified the standard of review issue in 1989, in *Firestone v. Bruch*.<sup>25</sup>

In *Firestone*, the Court determined that the arbitrary and capricious standard of review<sup>26</sup> should apply when the plan administrator is given discretionary authority to determine both the eligibility for benefit plans and the administration of those benefits.<sup>27</sup> The Court principally relied on the background principles of trust law to justify the creation of this scheme.<sup>28</sup> Where fiduciary principles<sup>29</sup> are implicated, which is generally the case in benefits eligibility

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22. 29 U.S.C. § 1101–1461 (2000).

23. 29 U.S.C. § 1132(a)(1) (2000) (granting the private right-of-action for individual citizens to file lawsuits alleging ERISA violations in the federal courts).

24. History of EBSA and ERISA, *supra* note 20 (“Since its enactment in 1974, ERISA has been amended to meet the changing retirement and health care needs of employees and their families.”).

25. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Professor John Langbein identified three categories of judicial review of ERISA benefits denial claims promulgated in *Firestone*: First, *de novo* became the default standard, “meaning that in the absence of contrary plan terms, a reviewing court should decide a contested benefit denial case afresh, giving no presumption of correctness to the plan administrator’s decision to deny the claim.” John H. Langbein, *Trust Law as Regulatory Law: The UNUM/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1322 (2007). Second, a plan instrument could be drafted in a manner “requiring the reviewing court to defer to the plan administrator’s decision, effectively defeating the *de novo* standard.” *Id.* Finally, “in such cases of plan-dictated deferential review, the reviewing court might need to temper its deference in circumstances in which the decisionmaker acted under a conflict of interest.” *Id.*

26. The arbitrary and capricious standard is generally interpreted by the courts to prohibit finding for the plaintiffs unless there is dishonesty, a failure to exercise proper judgment, or an unreasonable judgment. Bogan, *supra* note 5, at 631. Even if the court believes the fiduciary’s decision was wrong, it does not preclude judgment in his favor absent an abuse of discretion. *Id.*

27. *Firestone*, 489 U.S. at 115.

28. *Id.* at 111.

29. 29 U.S.C. § 1002(21)(A) (2000).

determinations such as the ones in *Geddes* and *Firestone*, the law of trusts, rather than the law of contracts, applies.<sup>30</sup>

The Court in *Firestone* found both the legislative history and the plain language of the statute persuasive evidence that trust law should be controlling in ERISA litigation.<sup>31</sup> ERISA is filled with the terminology of trust law, and the Court in *Firestone* continually referred to these terms. For example, “fiduciary,” “trustee,” “beneficiary,” and “participant” are all terms used multiple times throughout the statute.<sup>32</sup>

Basic trust principles indicate that when the terms of the instrument give discretion to the trustee to exercise the power of the trust, courts cannot question the trustee’s judgment absent a clear abuse of discretion.<sup>33</sup> As the Court acknowledged in *Firestone*, this idea has been a fundamental part of American law for more than a century.<sup>34</sup> The Court in *Firestone* upheld this basic trust principle, reiterating that courts are not to interfere with the trustee’s exercise of discretion if it has been vested in him by the trust instrument itself.<sup>35</sup>

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30. 70 C.J.S. *Pensions* § 35 (2000) (“The common law of trusts offers a starting point for an analysis of ERISA unless it is inconsistent with the language of the statute, its structure, or its purposes.”).

Some scholars have criticized the importation of trust law into the ERISA scheme. Professor Langbein noted that ERISA’s version of trust law diverges from traditional notions of trust law in one important area: plan administrators are not by their nature disinterested whereas trustees traditionally have no personal stake in the trust assets. Langbein, *supra* note 25, at 1326. Regardless of how the administration of the plan is established, plan administrators are aligned with the employer, who is either a source of their revenue or a source of their salary, and as such cannot expect to be entirely disinterested. *Id.*; see also Bogan, *supra* note 5, at 633 (“[T]he Firestone Court failed to examine the nature of a plan participant’s remedy for ‘benefits due . . . under the terms of his plan’ provided in ERISA § 502(a)(1)(B) to determine whether that remedy corresponded with the Court’s application of trust law.”).

31. *Firestone*, 489 U.S. at 110–11. The Court holds that certain principles developed in the laws of trust are applicable to ERISA fiduciaries. *Id.* at 110 (citing H.R. REP. NO. 93–533, at 11 (1973)). The Court also draws this conclusion from the plain language of the statute regarding its provisions concerning fiduciary responsibilities, which mirror the language and concepts of trust law. *Id.* at 110–11.

32. *Id.* at 110. The Court cites the language of various ERISA provisions, including 29 U.S.C. § 1002 and § 1104. *Id.*

33. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).

34. *Firestone*, 489 U.S. at 111.

35. *Id.* (citing *Nichols v. Eaton*, 91 U.S. 716, 724–25 (1875)); see generally 90A C.J.S. *Trusts* § 351. However, as Professor Langbein points out, importing trust law into a regulatory scheme is not an exact fit. Langbein, *supra* note 25, at 1336. As a rule, employees generally do not have the opportunity to bargain with their employer regarding the applicable standard of

ERISA defines fiduciary as one who “exercises any discretionary authority or discretionary control respecting management of [a] plan or exercises any authority or control respecting management or disposition of its assets.”<sup>36</sup> Under ERISA, the plan administrator/fiduciary has the authority to construe disputed terms and, in certain instances, the reasonable interpretation of such terms will not be interfered with.<sup>37</sup> These powers are tempered by the fiduciary’s traditional duties of care and loyalty,<sup>38</sup> which require plan administrators to act prudently and solely in the interest of the plan beneficiaries within the stated purpose of the plan.<sup>39</sup>

*B. Geddes v. United Staffing Alliance Employee Medical Plan*

1. Background

In *Geddes v. United Staffing Alliance Employee Medical Plan*, the Tenth Circuit held that the arbitrary and capricious standard of review should be extended to cases where fiduciary duties were delegated by the plan administrator to non-fiduciary third parties because delegation of duties is an appropriate exercise of fiduciary discretion under ERISA.<sup>40</sup> *Geddes* involved a dispute over whether Andrew Geddes<sup>41</sup> was entitled to reimbursement from his insurance provider

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review as part of their benefits package—it is a take-it-or-leave-it proposition. *Id.* at 1323–24. Thus, unlike a traditional trust, there is no bargained-for agreement to defer to the decision of the plan administrator. *Id.* at 1324.

36. 29 U.S.C. § 1002(21)(A)(i) (2000).

37. 70 C.J.S. *Pensions* § 35 (2005).

38. Regarding ERISA plan administrators, the duty of care has been described as “the duty of prudent administration.” Langbein, *supra* note 25, at 1326. The duty of loyalty has been characterized as “requir[ing] plan fiduciaries to act solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.” *Id.* (citing 29 U.S.C. § 1104(a)(1)(A)(i) (2000)).

39. 70 C.J.S. *Pensions* §§ 39a, 44. To determine whether an interpretation is reasonable or if an abuse of discretion has occurred, courts often look at such factors as internal consistency of the plan under the interpretation, any relevant administrative rules and regulations, the facts of the individual benefits determination that led to the interpretation, and any allegations or inferences of bad faith. *Id.*

40. *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 927 (10th Cir. 2006).

41. Andrew Geddes was a minor whose parents, Michael and Kari, filed suit on his behalf. *Id.* at 922.



for certain medical care resulting from a spinal injury.<sup>42</sup> All parties agreed that Andrew was covered as a dependent under Michael Geddes' health plan ("Plan") and that United Staffing Alliance ("United") was named as fiduciary and plan administrator in the plan instrument.<sup>43</sup> The terms of the health plan also stated that United Staffing Alliance would employ a third party, Everest Administrators, Inc. ("Everest"), to administer the Plan subject to final review by United.<sup>44</sup>

Upon reviewing the claims filed for Andrew, Everest directed United to pay only \$40,921 of \$185,892 in medical bills.<sup>45</sup> Following failed appeals to Everest,<sup>46</sup> the Geddeses filed a lawsuit in the U.S. District Court for the District of Utah<sup>47</sup> alleging, among other claims, improper denial of benefits and breach of fiduciary duty in violation of ERISA.<sup>48</sup> Specifically, the Geddes disputed the determination that

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42. *Id.* at 922–23. Andrew severely injured his neck and spinal cord after diving into shallow water during a church excursion to Lake Powell in 2002. *Id.* at 922. Immediately following the accident, he was unable to move his arms or legs and was airlifted to St. Mary's Hospital in Grand Junction, Colorado. *Id.* After spending time in intensive care, Andrew underwent surgery to repair his spine and was transferred two weeks later to a children's hospital in Salt Lake City, where he received extensive in-patient care for his C-4 asia class C spinal injury and urinary tract infection for the next sixty days. *Id.*

43. *Id.* The plan document stated in pertinent part: "The company is the *named fiduciary* and is the *plan administrator* of the Plan. The Company will engage an independent *claims administrator* to administer the Plan, however, the Company makes all final decisions about benefits made from the Plan." *Id.* at 934 (Holloway, J., dissenting) (quoting Aple. Supp. App. 250).

44. *Id.* at 922 (majority opinion). The contract between United and Everest was unambiguous regarding the nature of their relationship:

The Contract Administrator [Everest] shall not be deemed a Plan "fiduciary" as defined in ERISA. [Everest's] services shall not include any power to make decisions regarding Plan policy, interpretations, practices or procedures, but *shall be confined to ministerial functions* such as those described by the U.S. Department of Labor in its Regulations Section 2509.75-8, D-2 . . . . [Everest] shall have *no final discretionary control* over Plan management, including disposition of Plan assets and Plan administration. [Everest's] services hereunder shall be subject to review, modification, or reversal by the Plan Sponsor and/or Plan Administrator.

*Id.* at 935. (Holloway, J., dissenting) (citation omitted).

45. *Id.* at 922 (majority opinion).

46. *Id.* at 923.

47. The parties filed cross-motions for summary judgment on all claims. *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 2:03-CV-00440, 2005 WL 1414268 (D. Utah Mar. 23, 2005). The district court granted summary judgment on the denial of benefits claim in favor of the plaintiffs. *Id.* at \*12.

48. *Geddes*, 469 F.3d at 923. The denial of benefits claim was filed under ERISA

the unpaid portions of Andrew's treatment were charged by the hospital at a rate beyond what was "usual and customary" and in some cases deemed "rehabilitative."<sup>49</sup>

The most potent issue in *Geddes* was whether the defendants were entitled to the arbitrary and capricious standard of review or whether the claims should be reviewed under the *de novo* standard.<sup>50</sup> The district court evaluated the summary judgment cross-motions under the *de novo* standard, allowing the court to scrutinize all necessary evidence without deference to the defendant.<sup>51</sup> Ultimately, the district court determined that Andrew Geddes was entitled to payment of nearly all the disputed medical charges.<sup>52</sup> On appeal, however, the

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§ 502(a)(1)(B) and (a)(3) and breach of fiduciary duty under ERISA §§ 404(a) and 502(a)(3). *Id.* The Geddeses also filed a charge alleging violation of ERISA § 502(c)(1)(B) because the defendants allegedly failed to provide requested benefits plan documents. *Id.*

49. *Id.* at 922–23. The Plan imposed a \$2,500 cap on treatments considered rehabilitation. *Id.* at 923. The Geddes also disputed Everest's interpretation of the term "usual and customary." *Id.*

50. *Id.* In emphasizing the importance of determining the standard of review issue, the court pointed out that "[t]his question colors all the rest." *Id.*

51. *Geddes*, 2005 WL 1414268, at \*7–8. In its opinion, the district court delineated exactly what evidence it would consider under the *de novo* standard:

Under the *de novo* standard of review, the Court considers the relevant documents in the record to determine the proper interpretation of the disputed provision in [the Plan]. The Supreme Court has held that any ambiguities in an ERISA plan must be construed against the employer, as the drafter of the disputed document, in accordance with trust and contract principles of construction. Furthermore, when reviewing the denial of benefits *de novo*, "the burden is on the Defendants to prove that Plaintiffs' interpretation of the [Plan] is unreasonable." And lastly, while the court is limited to the administrative record when conducting a review under the arbitrary and capricious standard, the court may, when reviewing a plan administrator's decision under a *de novo* standard, "supplement the administrative record 'when circumstances clearly establish that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision."

*Id.* at \*8.

52. *Id.* at \*12. The district court held that United's instructions to Everest regarding the interpretation of "usual and customary" pricing were unreasonable and that the plaintiffs were entitled to coverage of St. Mary's Hospital invoices as billed. *Id.* at \*9–\*10 ("In the absence of some explanation, guidance, or definition of 'usual and customary' as applied to the Plan, United Staffing's approach of paying out-of-network providers the same discounted rate it has contractually arranged to pay in-network providers is an unreasonable interpretation of the Plan's plain language."). Further, the court held that all but a small portion of Andrew Geddes' care—approximately \$17,000 of the \$99,000 in charges—were rehabilitative and should have been paid by United. *Id.* at \*11. The court stated, "Calling Andrew's treatment rehabilitative care would be inconsistent with the conclusion of Andrew's treating physician at Primary Children's that his injuries required a two-month in-patient stay." *Id.* at \*10.

Tenth Circuit panel found that the district court erred in applying the de novo standard of review, affirming part of the court's decision as consistent under an evaluation using the arbitrary and capricious standard, and remanding the other claims to the district court for evaluation under the more deferential standard.<sup>53</sup>

## 2. Majority Opinion

The Tenth Circuit panel focused its analysis on the power given to United by the plan instrument.<sup>54</sup> The terms of the Geddes' benefits plan contained the so-called "*Firestone*" language,<sup>55</sup> which named United as fiduciary plan administrator and granted it power to determine eligibility and administer benefits.<sup>56</sup> The majority of the panel disputed the district court's determination that *Firestone* language in the benefits plan was negated by United's failure to exercise any of the discretionary authority given to it.<sup>57</sup>

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Because the de novo standard of review was used, the district court was able to utilize extrinsic evidence to interpret the terms "usual and customary" and determine whether Andrew Geddes' care was "rehabilitative." See *id.* at \*9–10. To determine the appropriate meaning of usual and customary, the court followed the persuasive authority of the Eleventh Circuit in *HCA Health Services of Georgia, Inc. v. Employers Health Insurance Co.*, 240 F.3d 982 (11th Cir. 2001). *Id.* at \*9. To determine whether United's interpretation of rehabilitative was appropriately applied to Andrew Geddes' hospital treatment, the court referred to an affidavit of Andrew's treating physician taken after the denial of benefits occurred. *Id.* at \*10. The court defended its decision to use this extrinsic evidence on the basis that the nature of Andrew's condition and care was too complex for the court to effectively analyze without the benefit of an expert opinion. *Id.* at \*10.

53. *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 928 (10th Cir. 2006). The Geddeses subsequently filed a petition for writ of certiorari on May 2, 2007, which was denied by the Supreme Court on June 27, 2008. *Geddes v. United Staffing Alliance Employee Med. Plan*, 128 S. Ct. 2993 (2008). For further information about the denial of certiorari, see *infra* Part I.B.4.

54. *Geddes*, 469 F.3d at 924.

55. In *Firestone*, the Supreme Court held that the de novo standard of review was to apply to all challenges to ERISA benefits determinations, unless the terms of the benefits plan gave the plan administrator discretionary authority to determine eligibility of benefits or construe the terms of the plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In those cases, the Court held the arbitrary and capricious standard of review is to be applied. *Id.*

56. *Geddes*, 469 F.3d at 924. The plan stated "[United Staffing Alliance] makes all final decisions about benefits paid from the Plan." *Id.*; see *Firestone*, 489 U.S. 101 (promulgating the language that triggers the arbitrary and capricious standard of review).

57. Compare *Geddes*, 2005 WL 1414268, at \*4–7 (explaining that United failed to exercise their discretionary authority, thus negating the language in the benefits plan entitling them to a deferential standard of review), with *Geddes*, 469 F.3d at 923–27 (explaining that

On appeal, the Tenth Circuit overturned the lower court's decision to apply the *de novo* standard of review.<sup>58</sup> The court held that delegation of fiduciary duties to Everest was proper under ERISA pursuant to the term of the Geddes' benefits plan.<sup>59</sup> According to the panel, neither Everest's actions nor any alleged failure to act on the part of United caused forfeiture of the arbitrary and capricious standard of review.<sup>60</sup> Because United "accepted" Everest's actions in reviewing the Geddes' claims<sup>61</sup> and ultimately remained liable for Everest's decisions, the court determined that United still deserved deference from the courts.<sup>62</sup>

Delegation of authority to Everest was proper, as the court explained, because:

Once a health plan administrator, the ERISA counterpart to trust law's fiduciary-trustee, has been delegated discretionary

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United's delegation of authority to Everest under the terms of the plan was proper and because United reserved the right to review the claim and retained liability, United did not forfeit the deferential standard of review).

58. See *Geddes*, 2005 WL 1414268, at \*8, for a discussion of how the *de novo* standard of review allowed extrinsic evidence to be admitted which aided the Geddes' claims. Based on the evidence presented at the summary judgment stage, the district court concluded:

In sum, the evidence demonstrates without dispute that the final determinations regarding the Geddes' claims were never reviewed by a fiduciary. In light of this finding, the court holds that United Staffing waived its right to deferential review on any of the claims. Notwithstanding, United Staffing's retention of discretionary authority through language in the Plan, this case is covered by the Tenth Circuit's exception to the "arbitrary and capricious" standard of review: *de novo* review is appropriate if an administrator disregards claims and appeals procedures or opts not to exercise its discretion.

*Id.* at \*7; see also *Geddes*, 469 F.3d at 924 ("Despite [the Firestone language], the district court found that by delegating claims administration to Everest, United Staffing failed to exercise its administrative discretion and thereby forfeited its right to deferential review.").

59. *Geddes*, 469 F.3d at 927.

60. *Id.* at 926. The circuit court held that the district court decision was not a valid extension of *Firestone*, went against the plain language of the ERISA statute, and violated trust law principles. *Id.* at 924. "To qualify [fiduciary] decisions for deferential review, *Firestone* requires only that ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document." *Id.* at 925.

61. See discussion *infra* Part II (regarding criticism of the majority's determination that United exercised any discretion).

62. *Geddes*, 469 F.3d at 924–25. The court disregarded the logic of the district court, which found that United failed to exercise its administrative discretion and thereby lost its fiduciary status for purposes of availing itself of the highly deferential arbitrary and capricious standard of review. *Id.*

authority under the terms of the ERISA plan, nothing prevents that administrator from then delegating portions of its discretionary authority to non-fiduciary third parties, as any similarly-situated trustee may do. This is especially true when such delegation is explicitly authorized by the plan document. The plan administrator remains liable, however, for decisions rendered by its agents, just as a trustee remains ultimately responsible for the actions of his delegates. In the instant case, the Plan specifically empowered its fiduciary, United Staffing, to employ an independent third party to review benefit claims, even while reserving to United Staffing final authority over all benefit determinations. United Staffing's decision to delegate limited authority to Everest Administrators according to the terms of the controlling Plan instrument accords with *Firestone* and with the background principles of trust law. It does not constitute a failure of fiduciary judgment sufficient to warrant *de novo* review.<sup>63</sup>

Thus, the majority of the court relied on the common law of trusts to bolster its interpretation that ERISA § 1105(c)(1) allows delegation of fiduciary duties to non-fiduciary third parties without forfeiting the court's deference.<sup>64</sup> So long as the plan administrator has been conferred discretionary authority as fiduciary by the terms of the plan instrument, the court held that the administrator exercised its discretion and is entitled to deference under the arbitrary and capricious standard of review.<sup>65</sup>

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63. *Id.* at 926.

64. *Id.* at 925–26. The court quoted the ERISA statute, “The instrument under which a plan is maintained may expressly provide for procedures . . . (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities . . . under the plan.” *Id.* at 925.

65. *Id.* at 926–27. The majority in *Geddes* stated in its opinion:

Indeed we would go so far as to say the plain language of the ERISA statute and the venerable body of trust law say just the opposite. Decisions made by an independent, non-fiduciary third party at the behest of the fiduciary plan administrator are entitled to *Firestone* deference because the third parties act only as agents of the fiduciary.

*Id.* at 927. Also, see generally *In re Butler's Trusts*, 26 N.W.2d 204 (Minn. 1947), which establishes that the trustee is at liberty to delegate administrative tasks to “agents” or “other persons” as is necessary to carry out the purposes of the trust. *But cf.* Karen Wahle and Ronald Dean, Litigating Participant Claims for Benefits, Remarks at the American Bar Association

Ultimately, the court found that United was liable to the Geddes for bills that it had deemed beyond the “usual and customary” rate because United’s interpretation was unreasonable even under the arbitrary and capricious standard.<sup>66</sup> However, the court remanded the claims that disputed Andrew’s care as rehabilitative back to the district court for determination under the arbitrary and capricious standard.<sup>67</sup>

### 3. Dissenting Opinion

The dissenting member of the Tenth Circuit panel viewed United’s grant of authority to Everest and the review of the Geddes’ claims in a strikingly different manner. Judge Holloway, in dissent, adopted the district court’s opinion, finding that United failed to exercise any of its discretion in reviewing the Geddes’ claims, instead solely relying on Everest for review and administration.<sup>68</sup> Because

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Continuing Legal Education Presentation: Washington, D.C. (May 10–12, 2007) (transcript on file with the author), which provides a negative analysis of the court’s application and analysis of delegation principles in trust law to the situation in *Geddes*.

66. *Geddes*, 469 F.3d at 930–31 (“Given its departure from industry custom and its deleterious effect on Plan beneficiaries, we find United’s interpretation of ‘usual and customary’ arbitrary and capricious.”).

67. *Id.* at 928.

68. *Id.* at 932 (Holloway, J., dissenting) (“In this case, the fiduciary party with discretion (United) did not act, and the party which acted (claims administrator Everest) had no discretion.”); *see also* *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 2:03-CV-00440, 2005 WL 1414268, at \*2 n.4 (D. Utah Mar. 23, 2005). The deposition testimony of Terry Ficklin, a partner owner of United, made clear that United did not exercise its discretionary authority to make final determinations regarding claims under its benefits plans:

[F]icklin . . . testified that United Staffing’s role only was to meet annually with Everest to review exclusions and deductibles:

Q: So if I understand what you are saying, [United Staffing] met with Everest and [United Staffing] determined the exclusions, correct?

A: Correct, on an annual basis.

Q: Right, and you determined things like deductibles? Is that correct?

A: Deductibles, yes.

Q: On an annual basis?

A: Prices.

Q: . . . So when you say United Staffing makes all final decisions about benefits paid from the plan, that’s what you are referring to is those annual determinations?

Everest was the only party which acted and was not named a fiduciary in the plan instrument, Holloway concluded the court did not owe any deference to United in this case.<sup>69</sup> Furthermore, Holloway wrote that by delegating all of its discretion to Everest, United's actions were contrary to congressional intent that benefits plans are to be administered by a fiduciary.<sup>70</sup>

Holloway's dissent was predicated on the trust law principle that courts owe deference to a fiduciary's analysis of the claim, not the mere right to exercise discretion.<sup>71</sup> Thus, Holloway concluded, if a

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A: Yes, that's my understanding of what that meant when they explained that part to me. . . .

Q: Okay. So United Staffing never sits down and reviews a claim from a plan participant to determine whether the claim is going to be covered or not?

A: We do not. Never have.

Q: That's Everest's responsibility, correct?

A: Yes.

*Id.* Additionally, Ficklin's deposition testimony evidenced that United did not personally review nor participate in the appeals nor had any knowledge (prior to the current litigation) of the care received by Andrew Geddes and how much of his claims were reimbursed:

Q: So United Staffing never sits down and reviews a claim from a plan participant to determine whether that claim is going to be covered or not?

A: We do not. Never have.

Q: Would it be fair to say that you don't know any of the specifics? And again, when I say you, I am talking about United Staffing, know any of the specifics of the care that he received subsequent to his accident?

A: Not the specifics, to my knowledge.

*Id.* at \*7.

69. *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting) ("The question instead is simply whether any discretion was exercised to which the courts owe deference. I believe that on this record the answer to that question is clearly no.").

70. *Id.* Judge Holloway stated in his dissent:

The majority's holding, which is in effect that *any* act authorized by a party vested with discretion must be reviewed with deference, is contrary to—rather than dictated by—the common law of trusts, is contrary to the manifest intent of Congress for ERISA plans to be administered by a fiduciary, and creates a circuit split by adopting its unprecedented holding.

*Id.* See also 29 U.S.C. § 1101(a) (2000), which states that the intent of ERISA is to protect employees from being wrongfully deprived of their benefits.

71. *Geddes*, 469 F.3d at 933 (Holloway, J., dissenting) (citing *Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625 (10th Cir. 2003)).

fiduciary does not exercise discretion, nothing exists to which the court can defer, and a *de novo* review of the entire record is warranted.<sup>72</sup>

Both the majority and dissenting opinions agree that Everest reviewed the Geddes' claims and made all decisions regarding its initial administration and adjudication of subsequent appeals after certain benefits were denied.<sup>73</sup> However, where Judge Holloway found a total failure to exercise discretion by United, the majority found United's acceptance of Everest's decision—even though admittedly without any meaningful review—to be a sufficient exercise of discretionary authority.<sup>74</sup>

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[I]f a trustee fails to act or to exercise his or her discretion, *de novo* review is appropriate because the trustee has forfeited the privilege to apply his or her discretion; *it is the trustee's analysis, not his or her right to use discretion or a mere arbitrary denial, to which a court should defer.*

*Gilbertson*, 328 F.3d at 633 (emphasis added) (quoted in *Geddes*, 469 F.3d at 933 (Holloway, J., dissenting)); see generally RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. 1(b) (2003).

Furthermore, a court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.

*Id.*

72. *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting).

73. *Id.* at 934. Based on the deposition testimony of United, it was clear and undisputed to the district court as well as all members of the 10th Circuit panel that United made no affirmative actions regarding the Geddes' claims. *Id.* at 934 n.3.

74. *Id.* at 935–36.

The contract under which Everest acted was quite clear on the point: 'The Contract Administrator [Everest] shall not be deemed a Plan "fiduciary" as defined in ERISA. [Everest's] services shall not include any power to make decisions regarding Plan policy, interpretations, practices or procedures, but *shall be confined to ministerial functions* such as those described by the U.S. Department of Labor in its Regulations Section 2509.75-8, D-2. . . . [Everest] *shall have no final discretionary control* over Plan management, including disposition of Plan assets and Plan administration. [Everest's] services hereunder shall be subject to review, modification, or reversal by the Plan Sponsor and/or Plan Administrator.'

*Id.* at 935 (citation omitted). Though both Everest and United in their pleadings maintain that Everest never exercised any discretionary authority, both the majority of the panel and the dissenting judge agree that Everest took all actions with regard to review of the initial claims and subsequent appeals and United took no affirmative action. *Id.* at 934.



Despite both Everest's and United's claims that Everest was not endowed with fiduciary status nor acted with discretion in relation to the Geddes' claims, the majority also argued that Everest indirectly exercised discretion and did so appropriately as an agent of United.<sup>75</sup> Judge Holloway refuted this position by pointing to Everest's deposition testimony, which he found showed a lack of exercise of anything more than clerical services.<sup>76</sup> Everest merely read codes that

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75. *Id.* at 927 (majority opinion). "For purposes of liability, decisions made by third parties are decisions made by the fiduciary. If a plan administrator has been allotted discretionary authority in the plan document, the decisions of both it and its agents are entitled to judicial deference." *Id.*

76. *Id.* at 935–36 (Holloway, J., dissenting). Judge Holloway found the following deposition testimony of Everest to prove that no discretion was exercised:

Q. Now, when a claim would come in under this plan, give me an idea of how it was decided whether the claim would be paid, how much would be paid, or whether it would be denied.

A. The basis for doing that is, of course, the provisions of the master plan document and the way that the care is coded or represented by the care provider.

There are universal codes, diagnosis codes, service codes that are used in the medical care field. And those codes are required to be on the bill. If they're not, then we are not able to process the bill. . . . And those codes are a way that the care provider themselves represents what the care provided was, what classification, what category of care it was. And from those codes we can determine which category on the schedule of benefits is the one that applies.

Again, it's a matter of correctly inputting the care codes in the claims administrator system. And that gives the claims administrator the information they need to categorize the care. Once the care is categorized, then the schedule of benefits dictates how the benefit payment is made. . . .

. . . .

But I think it's a pretty good summary of what happens to say that it's a matter of taking the codes that the care provider has assigned to the care they provided. That helps us categorize the care. And then from then—from that point on, the master plan document dictates what benefit is payable by the plan.

. . . .

Q. So then who makes the determination after that of the category that that particular type of service falls into?

A. Almost without exception, the provider of care has categorized the service that they have provided by coding it in a certain way. So—when you use the term judgment, to me, that means that there's some sort of judgment decision to make. And for the most part, that's not the case. It's a matter of simply—of correctly reading what the care provider codes are and putting it in the correct—putting it in the category that the care provider has assigned it to.

*Id.*

had previously been promulgated by United. Employees mechanically matched those codes with the categories under which the medical providers placed their services and applied the limitations on reimbursement as required by the benefits plan.<sup>77</sup> Because there was no subjective review on the part of either United or Everest that would amount to an exercise of discretion, Holloway held that only *de novo* review was warranted.<sup>78</sup>

#### 4. Denial of Certiorari

The Geddeses appealed the Tenth Circuit's decision, and the Supreme Court denied certiorari, a result recommended by the Solicitor General's office.<sup>79</sup> While the Solicitor General's office acknowledged the problematic nature of the Tenth Circuit's analysis—either the panel interpreted the law incorrectly or made a dubious application of the facts—it ultimately advised, for reasons beyond the merits of the case, that Supreme Court review was not warranted.<sup>80</sup>

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77. *Id.* at 936.

78. *Id.* at 932. Judge Holloway concluded:

[A]ny suggestion that the agent exercised discretion is not supported by the evidence concerning how the claims were handled and is directly contrary to the contractual provision governing the relationship between the fiduciary and the agent. Further, both the fiduciary and the agent specifically denied in their pleadings, under constraints of Fed.R.Civ.P. [sic] 11, that the agent exercised any discretion. And the record is clear that the fiduciary, United, did nothing at all. Consequently, the majority's naked assertion that some combination of the fiduciary and its agent exercised discretion is simply that—a naked assertion completely lacking in support.

*Id.*

79. Brief for United States as Amicus Curiae at 22, *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 2993 (2008).

80. *Id.* at 8.

Although petitioners' reading of the court of appeals' opinion is likely correct, plenary review is not warranted. There is at least some ambiguity in the opinion, and if interpreted as petitioners propose it would create an intracircuit conflict that the Tenth Circuit should be given an opportunity to resolve. Moreover, *de novo* review may ultimately be warranted in any event due to the United Staffing's apparent failure to provide a full and fair review of petitioners' claim, as required by ERISA, its implementing regulations, and the Plan.

*Id.*

## II. ANALYSIS

The majority's holding in *Geddes* distorts the purpose of the ERISA statute and effectuates an unjust result for the petitioners.<sup>81</sup> Because the *Geddes* decision creates a circuit split, the Supreme Court should have accepted certiorari and reversed the Tenth Circuit's ruling.

ERISA is a statutory scheme designed to safeguard the rights of employees, not employers or plan administrators.<sup>82</sup> While the principles of trust law invoked by the Supreme Court in *Firestone* are clear in their protection of discretionary power vested in a fiduciary by the plan instrument,<sup>83</sup> the Tenth Circuit's protection of United's inaction is irreconcilable with Congress' intent in drafting ERISA. The *Firestone* language contained in the Geddes' plan is meaningless unless accompanied by action.<sup>84</sup> United's fiduciary designation deserves no protection when left unexercised (a well-settled principle in other circuits as well as the common law of trusts.)<sup>85</sup>

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81. Professor Kevin Beatty alludes to the sort of standard of review problem embodied in *Geddes* in the conclusion of his 2000 commentary (although he does not directly address it).

Perhaps the most serious threat to the existence of the *Firestone* standard . . . [is] whether the current [arbitrary and capricious] standard, which essentially allows plan administrators to police themselves simply by supplying the proper language, is inherently unfair to plan participants. A standard that allows plan administrators to control the level of deference to be afforded their decisions does not appear to comply with the intent of the statute.

Kevin Walker Beatty, *A Decade of Confusion: The Standard of Review for ERISA Benefit Denial Claims as Established By Firestone*, 51 ALA. L. REV. 733, 750–51 (2000).

82. 29 U.S.C. § 1001 (a)(b)(1) (2000) (“[I]t is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare . . . that . . . safeguards be provided with respect to the establishment, operation, and administration of such plans. . .”).

83. “Where discretion is conferred upon the trustee . . . its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.” RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).

84. The Solicitor General's Office determined that the Tenth Circuit's decision could be interpreted in one of two ways—as an incorrect analysis of the law or an incorrect application of the facts. Brief for United States as Amicus Curiae at 8, *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 2993 (2008). If interpreted incorrectly analyzing the law, then “[the panel] fails to account for the need for discretionary authority to be exercised in order for deferential review to be appropriate.” *Id.* at 10. If interpreted as an incorrect application of the facts, then there is “little (if any) support in the record” that United exercised any discretion.” *Id.* at 18.

85. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. 1(b) (2003); *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 933–937 (10th Cir. 2006) (Holloway, J.,

The threshold question in *Geddes* is whether a plan administrator's choice to merely accept a third party's decision regarding denial of benefits without any meaningful review is adequate fiduciary action as envisioned by Congress when enacting ERISA. Given the undisputed intent of ERISA to protect employees' access to their benefits,<sup>86</sup> the level of review provided by United in this case is sorely lacking.

The deposition testimony of both Everest and United shows that Everest took all affirmative action with regard to the Geddes' claims, and that United was not even aware of the specific situation prior to litigation.<sup>87</sup> In addition, the actions taken by Everest were mechanical and clerical, strictly adhering to general rules previously promulgated by United.<sup>88</sup> Everest admitted in its testimony that its actions required no exercise of judgment of any kind.<sup>89</sup> Accordingly, Everest also admitted that, upon examination, the portions of Andrew's medical treatment deemed rehabilitative were in fact "medically necessary," but Everest was bound to its interpretation because of United's instructions on how to apply hospital coding.<sup>90</sup>

Exercise of discretion, by its definition, involves "individual judgment," "free decision-making," "wise conduct and management," "cautious discernment," and "prudence."<sup>91</sup> Neither the failure of United to set up a meaningful appeals process for claims,

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dissenting); see also *Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625, 631 (10th Cir. 2003) (holding de novo review is appropriate when a trustee fails to exercise his discretion); *Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 109 (2d Cir. 2005) (holding that deferential review is only appropriate in cases of actual exercise of discretion); *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 290–92 (11th Cir. 1989) (holding that no deferential standard of review applied because the decision-maker did not exercise any discretion).

86. 29 U.S.C. § 1001 a(b)(1) (2000); see discussion *supra* Part I.A.

87. *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting); see deposition testimony of Terry Ficklin, *supra* note 68.

88. *Geddes*, 469 F.3d at 936; see deposition testimony of Terry Ficklin, *supra* note 76.

89. *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting).

90. *Id.* at 923 (majority opinion); *id.* at 936 (Holloway, J., dissenting).

The hospital chose to use the numerical code for rehabilitative services rather than the code for services connected with hospitalization for most of the services provided. Rehabilitative services were limited under the plan to \$2,500.00. Everest read the codes used by the hospital and mechanically applied the limitation stated in the plan. This is the "exercise of discretion" to which, the majority holds, deference is required.

*Id.* at 936.

91. BLACK'S LAW DICTIONARY 499 (8th ed. 2004).

nor the strictly clerical nature of Everest's exclusive authority over the Geddes' claims demonstrated any of these characteristics.

The facts exposed by the depositions of both Everest and United show that the Geddes' claims underwent a review process that never involved looking outside of the application of a set of arbitrary codes.<sup>92</sup> Never once did United exercise any duty of loyalty or care<sup>93</sup> that would arise in the context of a fiduciary exercising its discretion. For example, United never examined whether the hospital's coding of the services rendered for the Geddeses could have been categorized differently to properly afford them reimbursement for their expenses.<sup>94</sup> Thus, the dissenting judge was correct in holding that he "disagree[d] with the fundamental premise that discretion was exercised by Everest as agent for United . . . [and] s[aw] no basis for employment of the deferential standard of review."<sup>95</sup>

Reversal of the Tenth Circuit's decision is further supported by policy discussed in the Geddes' petition for writ of certiorari to the Supreme Court. The Geddes contend that giving judicial deference to United on the mere basis of its delegation of duties to Everest effectively renders the term fiduciary impotent.<sup>96</sup> No fiduciary duties, such as loyalty and care, owed to the Geddeses arise as a consequence of a third party non-fiduciary's actions.<sup>97</sup> Thus,

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92. *Geddes*, 469 F.3d at 936 (Holloway, J., dissenting).

93. Langbein, *supra* note 25.

94. *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting).

95. *Id.* at 936.

96. *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919 (10th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3610, 16–17 (U.S. May 2, 2007) (No. 06-1458).

97. *Id.* The appellants discussed this policy issue in depth in their petition:

Because a fiduciary's decisions are governed by the duties he owes to the beneficiary's of the plan, it is logical that a Court should be required to defer to his discretion . . . When one exercises discretion, he becomes a fiduciary and must take upon himself fiduciary duties as to the matters with the scope of his discretion. In return, the courts will only interfere with his decision-making if his decisions are arbitrary and capricious. The Tenth Circuit's decision undermines ERISA, and it ignores these bedrock principles of trust law. Its reasoning renders the term "fiduciary" a hollow term, because it gives deference to the decisions of non-fiduciaries, who owe no duties to plan beneficiaries and thus have not earned that deference.

*Id.*

deference is given where deference has not been “earned,” which is contrary to the most basic principles of trust law.<sup>98</sup>

Allowing ERISA litigation to proceed in this manner potentially deprives Andrew Geddes and many other litigants of their rightful benefits. Thus, contemporary interpretations of ERISA are not providing protection for the Geddeses and other employees any better than the common law protected pensions prior to 1974.<sup>99</sup> Simple insertion of *Firestone* language in the plan instrument protects plan administrators like United from liability in all but the most egregious of circumstances,<sup>100</sup> costing beneficiaries such as Andrew Geddes and his parents tens of thousands of dollars in medical care<sup>101</sup> rightfully earned as a benefit of employment. The majority’s decision in *Geddes* provides no incentive for plan administrators to act solely in the best interests of the insured.

Furthermore, the arbitrary and capricious standard of review is the least demanding form of judicial review.<sup>102</sup> Where United, the named fiduciary, has failed to take any action to protect the rights of the beneficiary, Andrew Geddes, it would be unjust to limit the Geddes’ ability to present evidence and theories of recovery based on such

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98. *Id.* at 16–17. Judge Holloway’s dissenting opinion also supports this policy proposition made by the Geddeses. While he does not dispute the majority’s contention that United remains liable for the actions of Everest as its agent, regardless of whether Everest acted as a fiduciary, he notes that “surely [ERISA’s] purposes go beyond ensuring that someone can be held liable through court action.” *Geddes*, 469 F.3d at 934 (Holloway, J., dissenting). He further explains,

Under the ERISA scheme, a plan administrator exercises the function of handling claims with fiduciary responsibilities to the plan’s beneficiaries. This seems to be close to the heart of the legislative plan: “It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans . . . .

*Id.* (quoting 29 U.S.C. § 1001(b) (2000)).

99. *See* 29 U.S.C. § 1001.

100. Langbein, *supra* note 25, at 1322.

101. Approximately \$99,000 of Andrew’s hospital costs were categorized as rehabilitative when Everest interpreted the hospital’s codes according to United’s instructions. *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 22:03-CV-00440, 2005 WL 1414268, at \*11 (D. Utah Mar. 23, 2005). Everest admitted in a letter to the Geddes’ lawyers that approximately \$82,000 of those costs were medically necessary. *Id.* Thus, it seems that their status as non-compensable under the Geddes’ benefit plan is questionable, at the very least.

102. *Williams v. Int’l Paper Co.*, 227 F.3d 706, 712 (6th Cir. 2000).

deference.<sup>103</sup> *Geddes* created a significant conflict among the circuits in interpretation of ERISA law which should have been resolved by the Supreme Court.<sup>104</sup>

### III. PROPOSAL

The arbitrary and capricious standard of review, as it operates today in benefits denial cases, should be eradicated by Congress in favor of a uniform de novo standard of review.<sup>105</sup> Alternatively, the arbitrary and capricious standard of review could be retained, provided that a rebuttable presumption is created in favor of plan beneficiaries. This presumption should require specific pleading by the plan administrator to show appropriate fiduciary action was taken.

By holding plan administrators to the de novo standard of review, the protective intent of ERISA<sup>106</sup> is furthered because benefits providers would have an incentive to be actively involved in the claims review process. As Judge Holloway noted in his *Geddes* dissent, surely ERISA is about more than just holding someone liable in a court of law.<sup>107</sup> *Geddes* demonstrates that the current procedure for invoking the arbitrary and capricious standard of review allows plan administrators to outsource their work with little supervision and even less review.<sup>108</sup> The results of such business processes are on full display in *Geddes*: a mechanical denial of benefits by an outsourced claims review,<sup>109</sup> a high probability that disputed benefits are

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103. See discussion *supra* Part II.

104. See discussion *infra* Part III.

105. "A de novo or a less deferential judicial standard of review for review of a benefit denial would afford further protection of participants' ERISA rights by 'second guessing' the decisions of a plan administrator." Kathryn Kennedy, *Judicial Standards of Review in ERISA Benefits Claims Cases*, 50 AM. U. L. REV. 1083, 1094 (2001).

106. See discussion of intent of ERISA legislation, *supra* note 21.

107. *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 934 (10th Cir. 2006) (Holloway, J., dissenting) ("I realize that United's delegation of duties to Everest does not relieve it of liability because it is bound by the acts of its agent, as the majority opinion notes. But surely this statute's purposes go beyond ensuring that someone can be held liable through court action.").

108. See also Beatty, *supra* note 4 (explaining that the theoretical use of the arbitrary and capricious standard is understandable in light of ERISA's historical and statutory context, but its practical implementation is problematic because of the leniency it provides employers and administrators).

109. *Geddes*, 469 F.3d at 935–36 (Holloway, J., dissenting) ("Everest read the codes used

rightfully owed to the plaintiffs under their plan;<sup>110</sup> plaintiffs who were forced to resort to the courts to get any sort of meaningful appeal;<sup>111</sup> and protection of the plan administrator by allowing a highly deferential standard of review.<sup>112</sup>

If the law regarding standards of review in these cases was more strict, United would have been more likely to make itself aware of the Geddes' objections to their denial of benefits and would have conducted an inquiry into Andrew's injuries, the type of treatment he received, and whether the coding of these procedures was appropriate given the nature of his care. Only United had the power to change the application of hospital coding.<sup>113</sup> Everest's hands were tied.

As demonstrated by *Geddes*, the liberal application of the arbitrary and capricious standard of review is the equivalent of an escape clause for inaction. Even if a plan administrator does not fulfill its fiduciary duties pursuant to trust law, the Tenth Circuit will still rely on those same principles to protect the company by limiting the rights of the beneficiary to present evidence and recover from wrongful conduct.<sup>114</sup>

Many reasons exist as to why United would delegate all of its duties to Everest. Most, if not all, reasons likely are driven by traditional business models of profits and efficiency. But it is hard to believe that if faced with the possibility of litigation under de novo review of the entire record of its behavior toward its beneficiaries, United still would have persisted in failing to provide either review of Everest's decisions or a meaningful appeals process for those beneficiaries denied benefits, or both.

The differences in litigating a case under the de novo standard and the arbitrary and capricious standard are clear. Using a de novo

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by the hospital and mechanically applied the limitation stated in the plan.”).

110. *Id.* at 923; *Geddes v. United Staffing Alliance Employee Med. Plan*, No. 2:03-CV-00440, 2005 WL 1414268, at \*2 (D. Utah Mar. 23, 2005).

111. *Geddes*, 469 F.3d at 932 (Holloway, J., dissenting) (“[T]he record is clear that the fiduciary, United, did nothing at all.”).

112. *Geddes*, 469 F.3d 919 (holding that the district court erred in allowing de novo review because to qualify their decisions for deferential review, *Firestone* requires only that ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document).

113. *Geddes*, 2005 WL 1414268 at \*2 n.4, \*6 nn.41–42.

114. *See Geddes*, 469 F.3d 919.



standard of review, the Geddeses were allowed to introduce the entire administrative record, as well as extrinsic evidence where necessary, and the district court made an independent interpretation of the benefits plan as it applied to Andrew's care.<sup>115</sup> The outcome was that the Geddeses were entitled to reimbursement for nearly all disputed expenses.<sup>116</sup>

Under the arbitrary and capricious standard, the court's inquiry is limited to whether United acted dishonestly, failed to exercise reasonable judgment, or acted unreasonably, regardless of whether the panel would have made the benefits determination differently.<sup>117</sup> No extrinsic evidence is allowed. On remand, the Geddes will not be allowed to present the evidence which formed the basis of the district court's initial decision in their favor: an affidavit from Andrew's doctor explaining the urgent nature of his care and a letter from Everest<sup>118</sup> to the Geddes' lawyers calling the care "medically necessary."<sup>119</sup> Without this evidence, given the deference allotted to Everest's decisions, it is likely United's instructions on interpreting "rehabilitative" care would withstand scrutiny and the Geddeses would not recover those expenses.

The arbitrary and capricious standard shelters United and other plan administrators, allowing an escape clause to help them beat most litigation<sup>120</sup> and empowering them to act with far less than the traditional fiduciary intent called for in ERISA and dictated by the court in *Firestone*.<sup>121</sup> Until the arbitrary and capricious standard is either eliminated or significantly limited in its application, plan administrators will not be held fully accountable under ERISA in

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115. *Geddes*, 2005 WL 1414268, at \*8.

116. *Geddes*, 2005 WL 1414268.

117. Bogan, *supra* note 5.

118. *Geddes*, 2005 WL 1414268, at \*10.

119. *Id.* at \*11 ("The court finds significant that Everest acknowledges it 'extensively' reviewed Andrew's medical records and admitted that his care at Primary Children's was 'medically necessary.'").

120. See *Geddes v. United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 923 (10th Cir. 2006).

121. "The lenient application of the deferential abuse of discretion standard creates negative results for claimants. [T]he rule for deferential review . . . serves no apparent function other than to impede protection of employee benefit rights." Alison Rozbruch, *Resolving the Conflict Between Two Visions for a Standard of Review in ERISA Denial of Benefit Claims*, 9 J.L. & POL'Y 507, 552 (2001).

courts of law following the Tenth Circuit's approach. Congress should take action and instruct the courts to end or limit the use of the arbitrary and capricious standard of review in these cases.

#### CONCLUSION

The Tenth Circuit's reversal in *Geddes* constitutes tacit approval of a plan administrator's failure to enact policies which would fairly have provided benefits rightfully earned by the plan beneficiaries. So long as the courts are willing to shield this behavior behind the arbitrary and capricious standard of review, ERISA will never be the protective measure that Congress intended.

Congress should take immediate action and eliminate the liberal use of the arbitrary and capricious standard by the courts in ERISA litigation. By eliminating the deferential standard of review in benefits denial cases, or by severely limiting its application to cases where the plan administrator pleads with particularity its exercise of discretion, an incentive exists for plan administrators to create processes which ensure a fair distribution of benefits to employees. Plaintiffs who must resort to the courts for adjudication need those courts to have the power of independent, de novo review to ensure the protective intent of ERISA is present in its execution, and not just the character of its drafting.